1947.

File No. O. Stamps 49

Legal DEPARTMENT
A BRANCH

K

Subject: Opinions under the Indian Stamp Act, 1897

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No. 713

Office of the
Remembrancer of Legal Affairs,
Bombay Castle, 20th January 1949.

From

P.M.Lad, Esquire, I.C.S.,
Secretary to Government and
Remembrancer of Legal Affairs.

To

The Superintendent of Stamps.

Subject:- Recovery of stamp duty and penalty from Shiraj Ali Hakim.

Sir,

With reference to your letter No. 7146/S, dated the 24th August 1948 on the above subject, I have to observe as follows:-

Under section 29 of the Indian Stamp Act, the executant of the deed Shiraj Ali Hakim is liable for the stamp duty and penalty which can be recovered from him under section 48 as an arrear of land revenue. Under section 13 of the Bombay City Land Revenue Act, 1876, if the superior holder or person in possession, as the case may be, shall etc. fail to discharge the revenue due it shall be lawful for the Collector to levy the stamp duty by attachment and sale of such protion of the land on which revenue is due or of such portion of any property, moveable or immovable, of the defaulter as may be required to satisfy the demand. Consequently, it would be competent for the Collector to recover the stamp duty and penalty as an arrear of land revenue by sale of any property, moveable or immovable, of Shiraj Ali Hakim. Besides the

P.T .O.

property
~~PROPERTY~~ comprised in the deed. It appears that there is no other property of Shiraj Ali Hakim available for sale. The property comprised in the deed is already sold. Consequently Shiraj Ali Hakim has no more any interest in the property comprised in the deed. It would not therefore, be possible to recover the stamp duty and penalty by sale of the property comprised in the deed. In view of the fact that the stamp deed and penalty is not recoverable from Shiraj Ali Hakim the document will have to remain impounded with the Collector.

Your faithfully,

P.M.LAD.

O.C.

Remembrancer of Legal Affairs.

Submitted for signature.

Issued

C.S.P.
20/1.

MM
SC dated 5-6-'56.

Office of the R.L.A.

Indian Stamp Act, 1899, section 9.

Stamp duty on receipts passed by gangers for wages of the gan of workers.

Proviso (1) to section 3 of the Indian Stamp Act, 1899, provides that any instrument executed by or on behalf of or in favour of the Crown in cases where, f for this exemption, the Crown would be liable to pay the duty chargeable in respect of such instrument. Under section 30 a positive obligation to pay the stamp duty on a receipt is imposed on the person who gives the receipt. Consequently, even though a receipt is passed in favour of the Crown by a ganger the ganger and not the Crown would be liable to pay the duty chargeable in respect of the receipt, and the exemption under proviso (1) would not be available to the ganger. Under section 29, in the absence of an agreement to the contrary, the expense of providing the proper stamp dut in respect of instruments specified in clauses (a) to (shall be borne by the person as provided therein. Rece is not one of the instruments so specified and there be no other provision in the Indian Stamp Act providing fo an agreement in respect of payment of the stamp duty an there being positive liability under section 30 on the person giving the receipt, it appears that it would not legally feasible for Government to agree to bear the st duty in respect of receipt to be given by a ganger. Attention is invited to item 14 of the Government of India, Finance Department, Central Revenues, Notificati No. Stamps 6, dated 14 August 1937, as amended by No.11-Stamps, dated 20th November 1937, and No. I, date 15th February 1941. This Government may also pass an order under section 9 remitting the stamp duty on receipts given by a ganger if Government desires that a ganger should not bear this burden of stamp duty.

P.M.L.D.

Remembrancer of Legal Affairs.

U.R. to R.D., No. 91, dated 4th January 1949.

MM SC dated 4-6-'50.

Office of the R.L.A.

Section 2(24) of the Indian Stamp Act which defines the term "settlement" ~~xxxx~~ includes any agreement in writing to make such disposition and where any such disposition has not been made in writing any instrument recording, whether by way of a Declaration of Trust or otherwise, the terms of any such disposition. Having regard to this definition, it is quite clear that a settlement includes a Declaration of Trust where there is no prior disposition of the trust property in writing.

2. The words "dispose" or "disposition" where not limited by the context would extend to all acts by which a new interest(legal or equitable) in the property is effectually created. But merely crediting a sum in the account books is not enough to constitute a trust (section 34 of the Indian Evidence Act; 20 B.L.R. 186 and also 38 Bombay 445). Since entries in the books of account cannot constitute a valid trust, it cannot be said that any interest in favour of charity was created by the said entries thereunder so as to amount to a disposition of the trust property in writing.

3. The instrument is therefore chargeable to stamp duty as a settlement under Art.58(A) in respect of both the cash as well as the market value of the shares at the time of the execution of the instrument. The view taken by the Superintendent of Stamps is correct.

F.M.LAD

S.O.
Remembrancer of Legs Affairs.

U.O. to R.D.No.1889, dated the 16th February 1949.

Legal Department.

Section 9(a) of the Indian Stamp Act, 1899, provides that the Collecting Government may, by rule or order published in the Official Gazette reduce or remit, whether prospectively or retrospectively, in the whole or any part of the territories under its administration, the duties with which any instruments or any particular class of instruments, or any of the instruments belonging to such class instruments, or any instruments when executed by or in favour of any particular class of persons, or by or in favour of any members of such class, are chargeable. According to clause (12-A) of section 2 of the Act, "Collecting Government" means, in relation to stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, proxies and receipts, and in relation to any other stamp duty chargeable under the Act and falling within item 59 in List I in the Seventh Schedule to the Government of India Act, 1935, the Central Government and save as aforesaid the Provincial Government What is proposed by R.D. is to remit stamp duties chargeable on indemnity bonds to be executed for obtaining duplicate copies of policies of insurance ~~thereunder~~, "and not stamp duties on the policies themselves". As such the Provincial Government is the Collecting Government within the meaning of clause (12A) of section 2 of the Act and is competent to remit stamp duties.

Sd. J. R. D.

O.O.
Additional Secretary to Government.

U.O. to R.D., No. 2346
dated the 28th February 1949.

MM 50 dated 6-6-'50.

The H.D. view is correct.

Sec. 9(a) of the Indian Stamp Act, 1899, provides that the Collecting Govt. may, by rule or order published in the Official Gazette reduce or remit, whether prospectively or retrospectively in the whole on any part of the territories under its administration, the duties with which any instrument or any particular class of instruments, or any of instruments belonging to such class, or any instruments when executed by or in favour of any members of such class, are chargeable. Under cl. (12-A) of sec. 2 of the Act "Collecting Government" means, in relation to stamp duty in respect of bills of exchange cheques, promissory notes, bills of lading, letters of credit, policies of insurance, proxies and receipts, and in relation of any other stamp duty chargeable under the Act and falling within item No. 80 in List I in the seventh Schedule to the Govt. of India Act, 1935, the Central Govt. and save as aforesaid, the Provl. Govt. What is proposed to remit is the stamp duty in respect of receipts to be given by a ganger, and as the Central Govt. is the "Collecting Govt." within the meaning sec. 2(12A) of the Stamp Act in respect of receipts, it is for that Govt. to remit the stamp duty. The Bom. Govt. may, therefore, move the Central Govt. to suitably modify item No. 14 of the Govt. of India, F.D.(Central Revenues) Notification No.6, dt. 14-6-37.

Seen & corrected

Reply may be :- The view taken by BD is correct.

MM

SC dated 6-6-'50.

Office of the H.L.A.

Indian Stamp Act, 1899, sec. 9(a). H.D.Notfn. No. 4298/33, dated 8/1/41.

Since in exercise of power conferred by section 8(a) of the Indian Stamp Act, Government has remitted the duties chargeable in respect of agreements and bonds required to be executed by or on behalf of the holder of a scholarship or stipend awarded by Government (vide item No. 16 of H.D.Notification No.4298/33, dated 8-1-1941), the agreements in the present case would be exempt from payment of a stamp duty under the Indian Stamp Act.

P.M.LAD
a/a
Remembrancer of Legal Affairs.

H.D. to H.L.A.D. No. 1580 dated the 4th February 1949.

Submitted for signature.

MI

SC dated 6-6-'50

L.D.R.I.No. 2779 dt. 24.2.49

Subd.

Please see RLA's opinion No. 10753 dt. 10.11.48 at pp. 33-37 ante. The P.& S. D. communicated the views of the R.L.A. as well as those of the Slor. to Govt. in L.D. and the Supdt. of Stamps to the Govt. of India in its letter at p.45 ante and requested a final ruling in the matter. The Govt. of India, it appears, have consulted the Advocate General of India and he has expressed an opinion which supports the view taken by the R.L.A. (vide Note at p. 51 ante). The papers are now being shown to L.D. for remarks, if any. The papers may be seen and returned.

A copy of the 'Note' expressing the views of the Govt. of India may be kept on our record, and the papers may be returned with the remark "A/ seen and returned"/A

Ref. to P.S.D.
No. 2439. dt. 3-3-50.

[illegible]
[illegible] 50 dated 6-6-[illegible]50.

NOTE.

vice given to the Government of India is in accordance with the opinion of the Advocate-General of India obtained in the matter. The Government of Bombay have not shown any legal ground to show that the declaration in question is an affedavit chargeable with duty under Article 4 of the First Schedule to the Indian Stamp Act, 1899. The Provincial Government simply relies upon the long-standing practice prevailing in the Province whereby all declarations required to be made before a District Magistrate or a Justice of the Peace are charged with duty under the said Article. But practice cannot change the law, nor can it prevail over statutory provisions contained in any enactment. There is no sufficient cause shown by the Provincial Government to go against the opinion expressed by the learned Counsel. The legal position as explained by the learned Counsel in his opinion is briefly set out below:-

The expression "affidavit" is not defined in Articles 4 of the First Schedule to the Indian Stamp Act, 1899, nor in the General Clauses Act, 1897. Generally speaking, an affidavit is an oath in writing signed by the party deposing, sworn before and attested by a person who is authorised to administer the same. Even if it be assumed that the Indian Oaths Act, 1873 (consolidating the law relating to judicial oaths, affirmations and declarations) be applicable in the present case, as provided by section 4 of the Act only the courts and persons mentioned therein are authorised to administer oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them by law. The provision contained in the section is not applicable to the oath administered by the District Magistrate in the present case. The expression "oath" is defined by section 51 of the Indian Penal Code, 1860. As the declaration in question is not required or authorised to be made by law, the same is not "the oath" as provided by the said section and hence it is not an affidavit. The

Contd.

~~by the word solemnly and hence it is not an affidavit. The~~

declaration is not therefore liable to be stamped under the said

article.

.....

.....

M

50 dated 6-6-'56.

OFFICE OF THE U.L.A.

The questions raised by the Chief Controlling Revenue Authority are these :-

(1) As the debentures to be issued under the Mortgage Deed are bearer bonds chargeable under Art. 27(b), is the duty on the mortgage-deed to be calculated under Art. 27(b);

(2) If the answer to (1) is in the affirmative, whether the duty on each debenture scrip of Rs. 100/- should be computed separately and then the total amount of duty to be ~~recurrable~~ recovered on the mortgage or whether it is to be computed on the total amount of the loan to be raised by debentures;

(3) If the duty is to be charged under Art. 27(b) and if the property mortgaged includes Bombay property, whether the rate of duty prevalent for Bombay properties should be charged; and

(4) If the answer to the above questions is in the negative, whether the phraseology now used in the Exemption under Art. 27 should be amended so as to clarify the position that when the debentures contemplated to be issued under the mortgage deed are bearer debentures, they will be chargeable with duty under Art. 27(b).

Under Art.27 of Schedule I to the Indian Stamp Act, a debenture (whether on mortgage debentures or not) when transferable by endorsement or by a seperate instrument of transfer is liable to the same duty as a 'Bond' and when it is transferable by delivery, it is liable to the same stamp duty as a 'conveyance'. The 'exemption' ~~hereto~~ provides for a debenture issued by an

~~however provides for a debenture issued by an~~ incorporated company or other body corporate in terms of a registered mortgage-deed, duly stamped in respect of the full amount of debentures to be issued thereunder, wholly the company or body borrowing makes over, in whole or in part, their property to trustees for the benefit of the debenture-holders;

Provided that the debentures so issued are expressed to be issued in terms of the said mortgage-deed. In the case under consideration, the Tamani Metals and Alloys Ltd. is a company registered under the Indian Companies Act and it has executed a mortgage-deed in favour of the Trustees. Under the terms of the Mortgage-deed the company proposes to issue debentures to the tune of rupees fifteen lacs (vide clauses 2 and 3 of the Mortgage-deed).

The words "duly stamped in respect of the full amount of debentures to be issued thereunder" go with the mortgage-deed and it is impossible to contend that the exemption applies only if the mortgage-deed is duly stamped in respect of the full amount of duty payable on the debentures to be issued thereunder as it would mean reading the words "duty payable on" in the exemption clause.

The Mortgage-deed in question is registered and it is also stamped under Art. 40(b) in respect of the full amount of debentures (rupees fifteen lacs) to be issued. The debentures proposed to be issued are in pursuance of the terms ~~incorporated~~ of the said

mortgage-deed. It will thus be seen that requirements of the "exemption" to Art. 27 are satisfied and consequently, the debentures to be issued under mortgage-deed, even though they may be bearer bonds, would be exempt from payment of stamp duty a second time. Duty having been paid on the mortgage, the exemption is designed to avoid the hardship of a second payment.

That being the case, questions (2) and (3) would not survive. As regards question (4), amendment of the "exemption" to Art. 27 appears necessary to achieve the object.

The question of amendment may be taken up with the Revenue Department.

B.M.LAD
19/3

o/c

Remembrancer of Legal Affairs.

Forwarding letter No. 3065, dt. 19-3-49 from the R.L.A. to the Chief controlling Revenue Authority for the Town and inland of Bombay, General Stamp Office, Bombay.

MM

SC dated 9-6-'50.

Office of the R.L.A.

Indian Stamps Act, 1899.

Remission of stamp duty on indemnity bonds under Art. 34 executed for obtaining duplicate copies of insurance policies.

Seen and returned.

The view taken by the Revenue Department is correct and no reference to the Central Government is necessary.

(3)

P.M LAD
14/3

Remembrancer of legal Affairs.

U.R.to R.D. ,No. 2947, dated the 16th March 1949.

MM

50 dated 6-6-'49

Office of the R.L.A.

Statement of the Case.

In his opinion No. 14 dated the 20th June 1938, the Advocate General (Mr. M.C.Setalvad) while dealing with an instrument dated the 28th May 1938 observed as follows:-

p.23 ante

"In order to ascertain whether an instrument is a mortgage deed of movable property or an agreement relating to the pawn or pledge of movable property, the transaction as appearing from the true construction of the instrument will have to be gathered in each case. It is difficult to lay down any general test further than what can be gathered from the text books mentioned in the letters of the Superintendent of Stamps and the Government Solicitor.

The subject-matter of a contract of pledge usually consists of goods and chattles capable of actual or constructive delivery. Where therefore the property which is made subject of the security is not goods and chattels capable of such delivery or where, as in the present case, the security includes chattels, which may become the property of the borrowers in the future, there would be a clear indication that the transaction is a mortgage and not a pledge".

The test laid down by the Advocate General has been adopted by the Stamp Office with the result that every agreement for pledge providing that any goods may be substituted in future in place of goods originally pledged renders the instrument liable as a mortgage-deed with possession under Art. 40(a) of the Indian Stamp Act. This has caused a great hardship to the business community and the Indian Banks Association and the Bombay Exchange Banks' Association have represented to the Reserve Bank that the view adopted by the Stamp Office is incorrect. Their contention is that

pp.5.-7 36-37 ante

although a pledge of future goods is not possible since delivery is essential in a pledge ; an agreement to pledge future goods is possible since such an agreement need not be accompanied by delivery of possession.

pp.1-3 ante

In his letter dated the 28th September 1948 to the Secretary, Finance Department, the Deputy Governor of the Reserve Bank of India supports the View point of the Exchange Banks and states that the Bombay Stamp Office has misinterpreted the Stamp Act. He has further stated in the said letter that whatever may be the legal aspects of the question, Government should having regard to the hardship which is being caused to the business community remit the stamp duty on such document under section 9 of the Indian Stamp Act.

The Transfer of Property Act, 1882, deals with mortgages of immovable properties and the Indian Contract Act, 1872 deals with pledges of movable properties, but neigher Act deals with mortgages of movable property. However a mortgage of movables whether with or without possession is recognised by law. A pledge is a bailment of moveable property by way of security. Possession is given and the transaction involves a transfer of special property in the subject of the security. The distinction between a mortgage and a pledge is explained by Story in his book on Bailments as follows :

> "A morthage of goods is at Common law distinguished from a mere pawn. By a grant or conveyance of goods in gage or mortgage the whole legal title passes conditionally to the morthagee; and if the goods are not redeemed at the time stipulated the title becomes absolute at law, although equity will interfere to compel a redemption. But in a pledge

a special property only, as we shall presently see, passes to the pledgee the general property remaining in the pledgor. There is also another distinction. In the case of a pledge of personal property the right of the pledgee is not consummated except by possession; and ordinarily when that possession is relinquished, the right of the pledgee is extinguished or waived. But in the case of a mortgage of personal property the right of property passes by the conveyance to the pledgee and possession is not, or may not, be essential to create or support the title."

In Coote's Treatise on the Law of Morthages an hypothecation is distinguished from a mortgage and pledge in the following manner:-

> "An hypothecation differs from a mortgage in that there is no actual or executory conveyance or assurance of the property appropriate for the payment of the debt or loan and from a pledge in that there is no actual or constructive delivery of the property".

Having regard to the language of Article 6 under which an agreement relating to pawn or pledge is chargeable, it appears that only pledge of the present goods would fall under the Article. At the same time it is possible to contend as has been done by the Exchange Banks that a mere agreement to pledge future goods does not amount to a conveyance which is essential to a mortgage. A transfer of property that is not in existence operates as a contract to be performed in future which may be specifically enforced as soon as the property comes into existence (Mulla's T.P.Act, p.48). In the case of a mortgage which involves the transfer of an interest

of a mortgage which involves the transfer of an interest in property, the subject-matter has to be specified with reasonable certainty. In the case of an agreement for pledge the subject-matter is not itself described specifically except by reference to the possession of the pledgee. The contention of the Banks appears to be a perfectly plausible argument and the test laid down in the Advocate General's opinion may have to be applied with caution particularly when it is the only test of distinguishing between a ~~mortgage~~ mortgage and the pledge. As the matter is not free from doubt the Advocate General, Bombay is requested to advise.

8/1/49

Remembrancer of Legal Affairs.

U.R. to the Advocate General, Bombay, No. 313.
Dated the 11th January 1949.

SC dated 6-6-'50.

Advocate General's Chambers,
High Court, Bombay,
17th February 1949.

U.O.B. to the Advocate General of Bombay
No.312 dated the 11th of January 1949.

Opinion.

The forms of agreement are all on the footing that there is an immediate security created by way of pledge, and as security is also purported to be created on the goods which may at a future time be put in certain godowns. In so far as the agreement purports to create a pledge of future property, it is of no effect. That part of it can only be construed as an undertaking or agreement by the borrower to create a pledge as and when goods come in future by placing those goods in the possession of the bank. The document therefore is partly an instrument of pledge to which Article 6 would apply, but which is exempted from stamp duty, and partly an agreement.

The essence of a mortgage as ordinarily understood, is that the borrower transfers the general property or ownership of goods to the other party keeping to himself only the right of redemption. Whereas in the case of a pledge, the ownership remains with the borrower, and only a special property is created in favour of the lender. The definition of mortgage, however, in the Stamp Act section 2(17) is somewhat wider, and includes any instrument whereby a right over property is created in favour of any person. The agreement in question could possibly be construed as creating a right over property which the borrower agrees to pledge. But I do not think that Article 40 can apply, because section 2(17) speaks of specified property. In my opinion, future goods cannot be specified property within the meaning of section 2(17). (See A.I.R. 1945, Lahore, 69). Accordingly, in my opinion, the documents are being correctly stamped as

Cont

~~opinion, the documents are being correctly stamped as~~ agreements. I am unable to agree that if a security includes chattels which may become the property of the borrower in future, that is a clear indication that the transaction is a mortgage and not a pledge. I think that in arriving at any such opinion, sufficient weight was not given to the words "specified property".

Sd. Ck. Daphtary.
17.2.49
Advocate General.

Office of the ~~Act.~~ K.L.A.

The Advocate General [illegible], was consulted in the matter. A copy of his opinion (~~xx~~ No. 2 dated the 17th February 1949) is appended

P.M.Lal.

U.O. to F.D. No. 2206, dated 23-2-49.

No.4844
Office of the
Remembrancer of Legal Affairs,
Bombay Castle, 3rd May, 1949.

To
The Superintendent of Stamps,
General Stamp Office,
Bombay.

Subject:- Equitable mortgage Deed No. 5827 for 47
Rs. 40,000/- dated 30.10.47
Rababbai Binte Mulla Ebrahim Vohanvali
and another
to
Khan Sahib Ramjanally Jamalbhoy

Sir,

With reference to your letter No. 7437/3, dated 2.9.1948, in connection with the above subject, I have the honour to inform you that the document in question appears to be merely an agreement relating to deposit of title deeds and does not create any right over the property. The fact that the property is to be insured and the policy to be handed over to the lender would not change the nature of the document. Consequently the document would be chargeable to stamp duty under Art. 6 and not Art. 40 of Schedule I to the Indian Stamp Act(see Advocate General's recent opinion No. 11, dated 18.4.1949.)

Yours faithfully,

P.M.Lad
2/5
O.C.
Remembrancer of Legal Affairs.

MM

SC dated 6-6-'56 .

No. 10053/5

General Stamp Office,
Bombay, 29th Oct. 1947.

Remembrancer of Legal Affairs,
Bombay.

Subject:- Equitable Mortgage for Rs. 25000/- Ebrahim Tyebji and anr. -To- Mohsinbhai Abdul Tayeb Mesiwala.

I forward herewith the above mentioned document impounded by the sub-Registrar of Bombay and sent to the Collector (Asstt. Superintendent of Stamps) for action under Sec. 40 of the Indian Stamp Act.

2. By the document Ebrahimji Tyebji and Adamji Tyebji have, in consideration of Rs. 25,000/- advanced to them by Mohsinbhai Abdul Tayeb Mesiwala, deposited with him the title deeds comprised in the First Schedule pertaining to the land, hereditaments, and premises situated at Kumathipura and described in Schedule B, as an equitable security for the repayment of the sum of Rs.25,000/- with interest and all other moneys due. By clause 2(e), the borrowers covenant with the lender to execute a legal mortgage whenever called upon to do so. By clause 3(b) the lender is entitled to elect to convert the principal amount into an immediate debt on the destruction or damage of the premises by fire or by any other cause so as to impair the security of the lender. As the document was not an agreement relating to the deposit of title deeds but one creating an interest in the property, it was held by the Asstt. Superintendent of Stamps as an anomalous mortgage chargeable with duty as under:-

Mortgage - Art. 40(b) duty on Rs. 25,000/- ...	Rs. 187-8-0
Surcharge	Rs. 93-12-0
	Rs. 281-4-0

3. Not agreeing with this view, Messrs. Ina-atali and

mpany, Solicitors, have made an application for
fiqion of the order of the Collector to me under Sec. 56(1)
the Indian Stamp Act. They contend that sub-clause (b) of
ause 3 does not, in any way, alter the nature of the agree-
nt of the equitable mortgage so as to transfer or create
favour of the lender any right over or in respect of the
operty mentioned in Schedule B. They state that the sub-
clause (b) of clause 3 is to be read along with sub-clause-
(a) of clause 2. The effect then would be that in the event
of any of the contingencies set out in clause 3 happening,
the due date for payment, namely, the 23rd June 1949 mentioned
in clause 2(a) would be accelarated so as to make the debt
payable immediately on demand. No interest or right whatsoever
would accrue to the lender in respect of or over the said
property mentioned in Schedule B. It does not in any way
entitle the lender to recover the debt from the immovable
property or transfer or create any other right in respect of
the immovable property. The Solicitors further state that by
reason of the said sub-clause, the nature of the agreement is
not in any way altered so as to make the document chargeable
as Mortgage under Art. 40(b) of the Schedule to the Stamp
Act and that the document is properly stamped as an Equitable
Mortgage under Art. 6 as an agreement relating to the deposit
of title deeds. In support of their statement they quote a
passage at page 622 of Chitaley's Stamp Act, First Edition.

4. I am informed that prior to 1941. the Stamp Office
used to charge such documents with duty under Art. 6. Since
the receipt of your opinion No. 9678 dated the 8-11-1940 such
documents are being treated by the Stamp Office as anomalous
mortgages. Now the documents which are not mortgages of any
of the class mentioned in the Transfer of Property Act are
treated by the Stamp Office as anomalous mortgages. Many a
Solicitor has protested against this view urging that if the
not fall clearly under any of the definitions

Contd.

of mortgage either in the Indian Stamp Act or in the Transfer of Property Act, it cannot be charged as a mortgage. Here the document is not a possessory mortgage, nor a mortgage by a conditional sale, nor an English mortgage, nor still an usufructuary mortgage, i.e., it does not fall under any of the definitions of mortgage under the Transfer of Property Act. According to Section 59 (g) of that Act a mortgage. But to call it an anomalous mortgage, the document must be a mortgage in the first place and a mortgage under the Transfer of Property Act is only possible in the case of immovable property. If the property is not immovable, none of the definitions in the Transfer of Property Act apply. It is, therefore, necessary to turn to the Stamp Act which admits of mortgages of movable property. Under the Transfer of Property Act interest in specified immovable property is required to be transferred to create a mortgage, while under the Stamp Act it is enough if a right is created or transferred on some specified property. It has been pointed out to me that the property mentioned in the Schedule is not the specified property within the meaning of that term and that there is no transfer of such property so as to treat the document as a mortgage under the Transfer of Property Act. So also there is no right made in favour of the lender so long as the property is in existence. As the right becomes enforceable on the destruction of the property, it is contended that the document does not become a mortgage under the Stamp Act.

5. As the point is not free from doubt, I request you kindly to favour me with your opinion as to the stamp duty leviable on the document. If necessary, you may obtain the Advocate General's opinion on the subject.

Yours faithfully,

Chief Controlling Revenue Authority

No. 3512
Office of the

Remembrancer of Legal Affairs,

Bombay Castle, 18th May 1949.

To

The Chief Controlling Revenue Authority,

BOMBAY

Subject: Equitable mortgage for Rs. 25000/-
Ebrohim Tyabji and another
to M.A.T.Mussiwala.

Sir,

With reference to your letter No. 10053/3, dated 26th/30th October 1947, regarding the above subject, I have the honour to state that in view of the Advocate General's recent opinion No. 11, dated 18-4-1949 the instrument is chargeable to duty under Art. 6 and not under Art. 40.

The document in question is returned herewith.

Yours faithfully,

o/c P.M.Lad.
17/5

Remembrancer of Legal Affairs.

SC dated 6-6-'49.

Office of the B.L.A.

Statement of the case for opinion
of the Advocate General.

Messrs. S.F.E.Tyabji & Co., Solicitors and forwarded to the Collector (and Assistant Superintendent of Stamps) the Memorandum of Equitable mortgage (enclosed herewith) for certification. The document was examined by him and found to be chargeable as under-

(a) Agreement relating to the deposit of title deeds (Art.6 1) (a).....Rs.270-0-0

(2) Agreement to execute a legal mortgage Art. 5(c).....Rs.1-0-0

Rs. 271-0-0

plus Surcharge Rs. 135-0-0

Rs. 406-0-0

On payment of the stamp duty the document was certified under Sec. 43 of the Indian Stamp Act. The Solicitors then presented it for registration before the Sub-Registrar along with another agreement of even date. The Sub-Registrar finding that some of the clauses in the Agreement would convert the Equitable mortgage into a regular mortgage impounded the Agreement and sent it to the Collector for action under sec. 40 of the Act. On these facts the Superintendent of Stamps had requested the B.L.A. to express his opinion on the following points:

(1) Whether the document impounded by the Sub-Registrar, which on the face of it is an agreement can be taken to be one of the series of the documents employed to complete the contract of mortgage falling under section 4 of the Indian Stamp Act; or

(2) whether mortgage duty under Article 40(6) of the

Act can be recovered on the agreement.

In his letter No. 6070, dated the 11th June 1947 the R.L.A. informed the Superintendent of Stamps, Bombay, as follows:-

"The Memorandum of Equitable Mortgage enclosed with your above letter contains an express covenant to pay the amount of debt and interest and not mere acknowledgement or an incidental statement in the declaration as to the purpose of the deposit as is the case in the usual precedents in Prudence (22nd Ed.) Vol.IV at pp 258-259 and Under-hills (Butterworth) "Encyclopaedia of Form and Precedents (2nd Ed.) Vol. X at p. 422. Although your certificate endorsed on the said memorandum is conclusive under section 42 of the Stamp Act, it seems necessary to point out to you, for your future guidance, that an express covenant in such an instrument may create an obligation to pay money and being attested the instrument may become a "Bond" as defined by section 2(5)(b) of the same Act so as to become chargeable under article 15 in the first schedule."

In his letter No. 6518/S, dated the 22nd August, 1947 the Superintendent of Stamps requests R.L.A. to enlighten him on the following points :-

" It is true that the document contains the covenant to repay the money but I think that such a provision is necessary for the so-called " Equitable mortgages. Art. 6 of the Schedule to the Indian Stamp Act refers to an instrument evidencing an agreement relating to the deposit of title deeds when such a deposit has been made by way of security for the money advanced or to be advanced by way of loan or an existing or future debt. It is not understood how there can be an agreement relating to the deposit of title deeds without such a covenant to repay the amount since the very object of thedeposit of title deeds is to

secure the loan.

In his opinion No. 423 dated 30-6-33, the Advocate General has stated that Art. 6 refers to an instrument which does not create any right over or in respect of immovable property but which merely records the fact of the prior deposit of title deeds with intent so to create a security thereon. Documents which create any any right over or in respect of property are chargeable as mortgages under Art. 40. When, however, a right is not created but the document merely records the deposit of title deeds with intent to create a security thereon for the money advanced it is chargeable under Art. 6. By clause 4 of the document, record of the deposit of title deeds has been made and the other clauses specify other terms. As by the document no interest has been created in the immovable property according to the Advocate General's opinion it was held to be an agreement relating to the deposit of title deeds. It was also held chargeable with an additional duty of Rs. 1-0-0 under Art. 5(e) as an agreement to execute a legal mortgage."

As the point involved is controversial, and as the Superintendent of Stamps, Bombay, desires that the Advocate General's opinion should be obtained, the Advocate General is requested to favour Government with his opinion.

S. P. M-L

Remembrancer of Legal Affairs.

U.O. to Advocate General, Bombay No. 11367 D/- 27th Nov. 1947

No. 11 of 1949.

Advocate General's Chambers,

High Court,

Bombay, the 18th April 1949.

U.O.N. to the Advocate General of Bombay,

No. 11307, dated the 27th of November 1947.

OPINION.

In order that a document may be covered by Article 40 of the Stamp Act as a mortgage, one person must transfer or create in favour of another a right over specified property by that document. If the document is a record of a transaction already completed, i.e. of a deposit of title deeds made by and a debt thereby secured, the document falls under Article 6. I have seen the document in question, viz. the indenture of the 1st of August 1948 between Jewabai and the Habib Insurance Co. It recites an agreement arrived at in the past, a loan made in the past and a deposit already effected and completed by way of equitable mortgage. The deposit by itself operated to create a right in the Habib Insurance Co. over the property. No doubt, the document contains certain covenants which are purely personal, but I do not think that any of the terms of it purport to create or transfer any right over the property in question. It is, in my opinion, strictly a memorandum of equitable mortgage, and as such, not liable to stamp duty under Article 40.

Sd. M. Bagley

Advocate General.

50 dated 6-1-56.

No. 4501
Office of the
Remembrancer of Legal Affairs,
Bombay Castle, 26th April 1949-

To
The Superintendent of Stamps,
Bombay.

Subject:-Stamp duty on agreement dat-
1-8-1946
Bai Jenabae R. Patel
and others to
Habib Insurance Co. Ltd.

Sir,

With reference to your letter No. 6513/3, dated the 22nd August 1947, on the above subject, I have the honour to forward herewith a statement of the case together with a copy of the Advocate General's opinion No. 11 dated the 18th April 1949.

The document received with your letter under reference is returned herewith.

Yours faithfully

o.c.- P.M.Lad
22/4
Remembrancer of Legal Affairs.

MM

RC dated 6-6-1918.

No. 513

Office of the
Remembrancer of Legal Affairs,
Bombay Castle, 15th January 1949

To

The Chief Controlling Revenue Authority,

General Stamp Office,

Bombay.

Re: Pledge of 500 shares in Chunilal Manilal Ltd.,
Vijayalaxmi Manilal
to
Chunilal Girdharlal.

Sir,

With reference to your letter No. 7233/[illegible], dated the 25th August 1948, on the subject noted above, I have the honour to observe as follows:-

The first contention raised by the Solicitors of Vijayalakshmi Manilal and others that the shares on the securit of which the loan has been raised are goods within the meaning of the exemption to Article 6 in Schedule I of the Indian Stamp Act and consequently the transfer deed would not be liable to any stamp duty does not appear to be valid. It is true that the definition of "goods" under the Indian Sale of Goods Act includes shares but that is a definition only intended for the purposes of that Act and cannot be imported into the Indian Stamp Act for the purposes of interpreting its provisions. If shares are included within the meaning of "goods" under the Indian Stamp Act, it would not be possible to reconcile clause (b) of Article 6 and exemption clause (a) thereunder. Prima facie it appears that the Indian Stamp Act does contemplate a distinction between security or share and goods. In Vora Mohomed Ali Vs. Ramchandra, 22 Bom. 785, it was held that the expression "goods or merchandise" is not equivalent to moveable property. The expression "moveable property" is of a wider import; it means property of every description except immoveable property and it, therefore, includes goods or merchandise, securities and others. (Compare section 3(36)

of the General Clauses Act, 1897). Consequently, the expression "goods or merchandise" for the purposes of Indian Stamp Act will not include securities and shares. The transfer deed would therefore be liableto a stamp duty under Article 40 clause (a).

The second point relates to the stamp duty on blank transfer deeds. The blank transfers executed by the mortgagor after depositingwith the mortgagee the shares create a good equitable security (see Regulation 18 in Table A to the First Schedule of the Indian Companies Act and Ghosh's Indian Companies Law, p. 764). These blank transfers would therefore be construed as intended to be employed for completing the transaction within the meaning of section 4(1) of the Indian Stamp Act and as such would be liable to a stamp duty as prescribed in that provision. It follows, therefore, that the view taken by the Chief Controlling Revenue Authority is correct on both points.

It appears that the Solicitors for Vijayalakshmi Manilal and others have requested the Chief Controlling Revenue Authority to refer the case to the High Court of the strength of the decision of the Bombay High Court in 'The Chief Controlling Revenue Authority vs. The Maharashtra Sugar Mills, Ltd.' (49Bom. L.R. 893) but the Chief Controlling Revenue Authority considers that he is not bound to make such reference to the High Court as that decision of the Bombay High Court is appealed against to the Federal Court and the matter is sub-judice In 'Chief Controlling Revenue Authority vs. the Maharashtra Sugar Mills, Ltd.' it was held by the High Court under section 69 of the Indian Stamp Act the duty of making a reference to the High Court arises only when

a serious point of law is to be considered and the breach of duty lies in a failure to appreciate that there is a serious point of law involved, and the word "may" in the section has therefore imperative force. Although that decision is appealed against to the Federal Court, it will have to be respected and followed until it is set aside by the Federal Court. Consequently, it appears that the Chief Controlling Revenue Authority will have to agree to make a reference to the High Court as desired by the Solicitors of Vijayalakshmi Manilal and others since a point of law is involved.

The stamped document in question and the transfer deeds received with your letter under reference are enclosed.

Your faithfully,

Sd. P. M. Lal

Remembrancer of Legal Affairs.

Subd. for signature

MM

SC dated 6-6-'56.

Office of the R.L.A.

Indian Stamp Act. Reference to the High Court as described by Solicitors M/s. Homar Dadachanji Sethna & Coy.

As advised by the R.L.A. in his opinion No. 583, dated 18-2-1949, the Chief Controlling Revenue Authority will have to agree to make a reference to the High Court as desired by the Solicitors, Messrs. Homar Dadachanji Sethna and Company. On a reference being so made, the recovery of the deficit stamp duty and penalty will have to be postponed until the reference is disposed of by the High Court.

P.M.Lad.
20/2

Remembrancer of Legal Affairs

U.O. to R.D. No. 2333 dated the 28th February 1949.

SC dated 6-6-'50.

Opinion of the B.L.A.

Statement of the Case.

The question for B.L.A's consideration is whether the view expressed by Mr. Sankarlar that in regard to the document dated 12th June 1948, referred to by him in his letter dated 20th December 1948 (copy enclosed), the stamp duty should be levied on movable properties also, is correct.

The application of the Stamp Act to particular instruments is governed by two fundamental principles:-

(i) The Court is not bound by the apparent tenor of the instrument but will decide according to the real nature or substance of the transaction.

(ii) The duty is on the instrument not on the transaction.

The first principle merely subordinates form to substance and the misdescription of an instrument by the parties does not affect the stamp duty e.g. an instrument purporting to be a license may in fact be a lease and chargeable as such. The second principle indicates the incidence of taxation viz. what is x subject to taxation. The two principles are not inconsistent with each other. They only mean that one must examine the transaction effected by the instrument in order to determine the character of the instrument but the duty is on the instrument or as it is sometimes said 'on the instrument as it stands.' As pointed out by Lord Esher in Commissioners of Inland Revenue V.Angus (1889) 23 Q.B.D. 579 589. 'It is not the transaction of the purchase and sale

which is struck at, it is the instrument whereby the purchase and the sale are effected which is struck at. And if any one can carry through a purchase and sale without an instrument, then the legislature have not reached the transaction.' In short, as pointed out in Minister of Stamps V. Townshend (1909) A.C. 633 @639 P.C. if parties can effectuate the transaction without an instrument there is nothing to tax.

Turning to the specific instance referred by Mr. Sankariar, the transaction is that of a sale of an estate as a going concern including good-will and the assets of the business. The recitals make it clear that some of the assets are not intended to be transferred by the instrument and those assets are recited to be of the value of Rs. 2,48,972/- while assets which are intended to be the subject-matter of the conveyance are of the value of Rs. 6,38,028/-. In the case of any instrument the substance of the transaction must be sought in the operative part of the instrument so that when it is a conveyance it is liable to duty on the transaction as appearing in the operative part although the conveyance may be a part of a larger transaction recited in the preamble. An agreement for sale is not a conveyance and reciting the agreement for sale of the whole transaction and the apportionment of the consideration between the assets intended to be conveyed by the instrument and the assets which are not so intended to be conveyed by the instrument is a proper thing to do. It only means that although the transaction covers a number of assets the instrument covers only a part of such assets. It may be that the purchaser may either have

~~assets. It may be that the purchaser may either have~~ separate instrument as regards the rest of the assets or may have no instrument at all if he is advised in terms of the Advocate General's opinion No. 37 of 1905, wherein the Advocate General opined that Stamp duty is only chargeable on the stated value of the immovable property in as much as by the Act, duty is assessed on the consideration for the conveyance and the immovable property alone is conveyed by the conveyance; and that though the conveyance recites the transfer of movable property and the receipt of the consideration for it, that is only to have all the evidence in that document and if the transfer had been acknowledged by an ordinary receipt it would have been chargeable if at all with duty of one anna under Article 53. (Cf the Opinion of the Solicitor Central Government referred to by the Superintendent of Stamps in his endorsement No.3600/S, dated 11th April 1949). To read the recitals in the operative part and then charge the entire transaction would be against the fundamental principles referred to above.

Under section 37 of the Stamp Act there is obligation on the parties to set out truly and correctly the consideration and all other facts and circumstances affecting the chargeability and omission to do so is an offence.

The Collector, while adjudicating the duty, has also the power to require the parties to state the consideration and such facts and circumstances on oath. These provisions coupled with the liabl

liability for penalty and in certain cases even prosecution should be sufficient safeguards against any evasion of duty. The proposals made by Mr. Sankariar, in his subsequent communications are not only unnecessary but may lead to considerable hardship and harrassment.

As the matter is of commercial importance the Advocate General is requested to give his opinion in the matter.

S. P. M. Ld

30/8/49

Remembrancer of Legal Affairs.

U.O.to Advocate General, No. 9672

Dated the 31st August 1949.

MM

SC

No. 28 of 1949.

ADVOCATE GENERAL'S CHAMBERS,

HIGH COURT,

Bombay, 26th September 1949.

Re: INDIAN STAMP ACT.

With reference to [illegible]official Reference No. 9872, dated the 31st August 1949, I state as under:-

As regards the application of the Stamp Act, to particular instruments, the things to be noticed is that the thing which is made liable to duty is an instrument. If a contract of purchase and sale or conveyance by way of purchase and sale can be or is carried out without an instrument the case is not within the Act and no tax is imposed. It is not the transaction of purchase and sale which is struck at; it is the instrument whereby the purchase and sale are effected which is struck at. And if any one can carry through a purchase and sale without an instrument then the Legislature have not reached the transaction. (per Lord Esher in Commissioner of Inland Revenue Vs. Argus (1889) 23 Q.B.D. 579 at 589)

Further at page 593 His Lordship in the above case observes that "The Crown cannot have the stamp duty unless the parties to the sale choose to effectuate the transaction by an instrument which of itself conveys the property".

For the purpose of ascertaining the Stamp duty on any particular instrument one should look at the substance of the transaction as disclosed by the whole of the deed and not merely to the language of the operative part or parts of the instrument. (per Garth C.J. in re the Mangaldas Estate, 12 Cal. 383).

When the conveyance recites that moveables have already been transferred by delivery, these do not pass under the conveyance and are not liable to duty. (In the matter of

reference under the Stamp Act, 23 Cal. 283). In the above Calcutta Case the nature and language of the document ~~was~~ was almost indentical with one referred to by Mr. Sankaran an there was an apportionment of price of moveables and immoveables. The Court held that the moveables were already delivered and were not transferred by the deed and hence no duty should be imposed.

But in practice the difficulty will arise because in law the mere use of the past tense is not sufficient to show that the instrument is only a Memorandum of agreement and not operative as conveyance. For this purpose reference mean be had to the following cases, Viz. Horsfall Vs. Hey (1848) 3 Exch. 775; Garnett Vs. Commissioner of Inland Revenue (1890) 81 L.T. 683; and Cohen and Moore Vs. Inland Revenue Commissioner (1933) 2 K.B. 126. In each one of these cases the transfer of moveables was recited in the preamble and the operative part did not refer to it, still the Court held that there should be advelorem stamp duty on the assets referred to in the preamble. Reference in this behalf should be had specially to the judgment of Darling J. and Channel J. in 81 L.T. 683 above referred to.

In my opinion this is a question which always depends upon the facts of each particular case. The sole question is whether or not there was a separate and independent transaction as to moveables apart from the deed. This is a point which does not depend upon precise reading of any instrument. If the intention of the parties was that the instrument shoul be the only repositary and the appropriate evidence of the transaction as to moveables the instrument should be regarded as a conveyance of moveables. If on the other hand, it merely recites a past accomplished fact the instrument is not a conveyance and should not be stamped as such.

A. M. P. Annamalai
Advocate General.

Opinion of the A.G.A.

A copy of the Advocate General's Opinion No. 28 of 1949 dated 20th September 1949 together with a copy of the statement of the case is forwarded herewith.

c/s. P.M.Iad.

Remembrancer of Legal Affairs.

U.O. to H.D. No. 11174

Dated 6th October 1949.

Submitted for signature.

MI

SC

Office of the B.L.A.

Indian Stamp Act
Art. 55
Release.

The question for B.L.A.'s consideration is whether the Commissioner's view that the instrument is a 'release' and as such correctly stamped under Article 55 of Schedule I to the Indian Stamps Act, is correct.

The application of the Stamp Act to particular instruments is governed by two fundamental principles :-

(1) The Court is not bound by the apparent tenor of the instrument, but will decide according to the real nature or substance of the transaction; and

(2) the duty is on the instrument, not on the transaction; and

The duty is not on the transaction, for if the parties can effectuate the transaction without an instrument, there is nothing to tax. Principle (2) means, that in order to determine the character of the instrument, one must examine the transaction effected by the instrument; but the duty chargeable is on the document as it stands. It is well settled that the stamp payable upon an instrument must be determined by referring to the terms of the instrument, and that the Court is not entitled to take into consideration evidence dehors the instrument itself (see 13 Rang 613).

Article 55 provides for 'release' that is to say, any instrument, not being such a release as is provided in section 23A, whereby a person renounces a claim.

(1) upon another person, or

(ii) against any specified property.

The word "claim" excludes a conveyance (see page 227 of Mulla's Stamp Act).

The recital at pages 5-6 of the instrument makes it clear that the Releasors who have a right or interest in the estates and effects of the late Mr. Sorabji etc. have renounced their interest or claim in the property on payment of the sum of Rs. 7000/-. It amounts to a release of a right or interest in the property. It would not amount to release of a right or interest in a property on sale. Having paid the said amount to the Releasors the Releasee have obtained a release from them under which the Releasors have renounced their interest in the property. It is held that a deed by which one co-owner renounced his claim for partition against the family property in consideration of a certain income to be enjoyed by him for life out of certain spetified property, was a "release" (16 Bom 233). The document is passed by way of family arrangement after taking accounts and it appears to be a "release" chargeable for duty under Article 55 of Schedule I to the Stamp Act. The view taken by the Superintendent of Stamps and Commissioner, Northern Division is Correct.

c/c. A.M.Ind,
Remembrancer of Legal Affairs.

U.O. to R.D. No. 14788 . dated the 19th December 1948